

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ORLANDO LOVE,

Plaintiff,

CASE NO. 1:14-cv-281

v.

HON. ROBERT J. JONKER

SHANIEKA DEVONNE MOSLEY
and DAVID SHARP,

Defendants.

**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Kent's Report and Recommendation in this matter (ECF No. 81) and Defendant Sharp's Objection to the Report and Recommendation (ECF No. 84). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the

Report and Recommendation itself; and Defendant's objection. After its review, the Court finds that Magistrate Judge Kent's Report and Recommendation is factually sound and legally correct.

The Magistrate Judge recommends: (1) denying Plaintiff's motion to for summary judgment against Defendant Mosley; (2) denying Plaintiff's motion to strike; and (3) dismissing Plaintiff's claims against Defendant Sharp. In the alternative to dismissing Plaintiff's claims against Sharp, the Magistrate Judge recommends that Plaintiff file a fifth amended complaint limited to: (1) his Eighth Amendment (sexual victimization) claim against Defendant Mosley under § 1983 and (2) his Eight Amendment (excessive force) claim against Defendant Sharp under *Bivens*. Plaintiff has not filed any objections. Defendant Sharp objects to the alternative recommendation on the basis that Plaintiff's claims against him arise under the Fourth Amendment, not the Eighth Amendment, and Plaintiff has failed to comply with the Court's previous order to file an amended complaint.

For purposes of the Magistrate Judge's Report and Recommendation, the Court sees no difference in result under either an Eighth Amendment or Fourth Amendment analysis, and so the Court takes no position at this time on which standard applies. Defendant Sharp should prevail under either standard. Moreover, the Court intends to adopt dismissal, rather than the alternative suggestion of amendment, thus mooting the balance of Sharp's objection.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 81) is approved and adopted as the opinion of the Court, subject to the limitations noted above.

IT IS FURTHER ORDERED that Plaintiff Love's motion for summary judgment against Defendant Mosley (ECF No. 59) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff Love's motion to strike (ECF No. 78) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff Love's claims against Defendant Sharp are **DISMISSED**.

The Court will proceed with Plaintiff's claim against Defendant Mosley under § 1983.

IT IS SO ORDERED.

Dated: October 18, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE